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Supreme Court of the United States

OCTOBER TERM, 1945

No. 1160

RANDOLPH PHILLIPS

Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION and THE UNITED CORPORATION

Respondents.

BRIEF FOR THE RESPONDENT THE UNITED CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: New York, N. Y.
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The United Corporation, a party respondent, opposes the petition herein for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit, dated January 31, 1946 (R. Part IV, XII), affirming orders of the Securities and Exchange Commission, dated November 24, 1944 and November 29, 1944 (R. Part II, 3a, pp. 61-63).

The United Corporation is a Delaware corporation and a registered holding company under the Public Utility Holding Company Act of 1935 (49 Stat. 803-838, 15 U. S. C. A. §§ 79-79z-6). It became a party to the proceeding in the Circuit Court of Appeals by order of that Court dated December 5, 1944 (R. Part I).

NOTE: Italics in quoted matter in this brief are supplied unless otherwise noted. The United Corporation will sometimes be referred to as "the Corporation", the Public Utility Holding Company Act of 1935 as "the Act" and the Securities and Exchange Commission as "the Commission."

Statement of Case

The orders of the Commission dated November 24, 1944 and November 29, 1944 approved a Plan for an exchange of securities filed under Section 11(e) of the Act.

The Plan for Exchange, as finally approved by the Commission and since fully consummated, provided that the Corporation would offer to exchange for each outstanding share of its $3 Cumulative Preference Stock and accrued dividends thereon (up to a total of 1,123,374 shares) 1-8/10 shares of the Common Stock of Philadelphia Electric Company and $6 in cash. The Plan was in no sense compulsory. Holders of the Corporation's Preference Stock were invited to make tenders of their stock as they wished.

The Plan became effective on December 5, 1944, the Circuit Court of Appeals having denied the plaintiff's motion for a stay, and the offer was oversubscribed when it terminated on December 19, 1944.

The Plan was proposed by the Corporation, and was specifically found by the Commission, to be a step in compliance with an earlier order issued by the Commission with respect to the Corporation under Section 11(b)(2) of the Act. That earlier order, dated August 14, 1943, required that the Corporation

> (a) change its existing capitalization to one class of stock, namely, Common Stock; and
>
> (b) take such action, in a manner consistent with the provisions of the Act, as will cause the Corporation to cease to be a holding company.
>
> *In the Matter of The United Corporation*, S. E. C. File Nos. 54-33, 59-25; Holding Company Act Release No. 4478.

As a result of the exchange of securities effected by the Plan, the Corporation reduced the amount of its $3 Cumula-

tive Preference Stock outstanding by approximately forty-five per cent and, by disposing of practically all of the Common Stock of Philadelphia Electric Company which it owned (about 19 per cent of the outstanding voting securities), the Corporation ceased to be a holding company with respect to that large operating utility.* The Corporation, however, continues to have several other statutory subsidiaries, viz. Public Service Corporation of New Jersey, Niagara Hudson Power Corporation, Columbia Gas & Electric Corporation and The United Gas Improvement Company.

Proceedings on the Plan before the Commission

The Findings, Opinion and Order of the Commission approving the Plan (R. Part II, 3a, pp. 13-63) were based upon the record of a number of hearings held before it, in which the petitioner, among others, participated. Moreover, all of the petitioner's objections to the Plan were briefed and argued by him before the full Commission before final orders approving the Plan were entered.

Proceedings in the Circuit Court of Appeals

Subsequent to the issuance of the Commission's order of November 29, 1944 approving the Corporation's Plan, Phillips filed, pursuant to Section 24(a) of the Act, his petition to review in the United States Circuit Court of Appeals for the Second Circuit, and made a motion before that Court for a stay of the order pending review. The motion for a stay was denied by an order of the Court entered on December 15, 1944. Thereupon, the Corporation proceeded to carry out the Plan as required by the Commission's order.

Argument on the petition to review was held almost a year later, on December 4, 1945, and briefs were submitted

* Subsequently, a second Plan for the exchange of Common Stock of Delaware Power & Light Company and cash, was approved and consummated. Phillips has also petitioned to review the orders of the Commission approving the second Plan (*Phillips* v. *Securities and Exchange Commission*, U. S. C. C. A., 2d.; No. 20051).

by all parties to the proceeding. On January 7, 1946 the Court (per Clark, J.) rendered its opinion unanimously affirming the orders of the Commission (R. Part IV, I), and on January 31, 1946 the Court entered the decree thereon which is the subject of this petition for a writ of certiorari (R. Part IV, XII).

Status of Petitioner

The petitioner claims to be the beneficial owner of 1,100 shares of the Corporation's Common Stock, which are registered in the name of his brother (R. Part III, p. 21). While he states that he is the "attorney-in-fact" for other stockholders of the Corporation (Pet. p. 6), this claim is based only upon proxies received by him from certain stockholders in connection with his unsuccessful "proxy contest" at the Corporation's annual meeting in 1944. The proxy statement sent out by him at that time expressly provided, however, that the proxy would not be used to represent the stockholders "before the Securities and Exchange Commission, nor in any proceeding in any Court" (R. Part II(2), p. 32a).

In fact, therefore, the petitioner had standing only to register his own views as to the Corporation's Plan and the Commission's orders approving the Plan.

Phillips' petition to review the orders approving the Plan asked that these orders be set aside in their entirety or, if not set aside, modified so as to impose upon the Plan certain conditions which would require the Corporation to change present provisions for a quorum at stockholders' meetings, to grant cumulative voting privileges to voting stockholders, and to place on its Board of Directors someone to "represent" those stockholders who gave proxies to the petitioner at the Corporation's annual meeting in 1944. In other words, the petitioner was at all times willing to accept the Plan *provided* the Court would engraft upon the

Plan certain conditions, which he sought on matters in which he had a controversial interest and which were irrelevant to the substance of the Plan.

The Circuit Court of Appeals found that the petitioner had received a fair and full hearing before the Commission, holding that the conferences between representatives of the Corporation and the Commission, which were the basis for the petitioner's protestations before that Court that he had been denied a full hearing, were nothing more "than legitimate prehearing conferences, of the kind which the Commissioners or their staff must have if all the intricate details involved in even a single holding-company simplification is to be carried to completion within the time of man" (R. Part IV, I). Since the petitioner states that he does not raise, on this petition for a writ of certiorari, any question as to whether he was deprived of a fair hearing by the Commission (Pet. p. 23), it seems to us that the "background" he seeks to create in his brief is beside the point.

Summary of Argument

In answer to the contentions set forth in the petitioner's brief, we submit the following:

1. There was no requirement under the Act, either express or implied, that the Corporation's Plan be submitted to a District Court for enforcement.

2. No conflict exists between the decision of the Circuit Court of Appeals in the instant case and the decision of the Circuit Court of Appeals for the Third Circuit in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission,* 134 F. (2d) 747 (1943).

3. Stockholder approval of the Corporation's Plan was not required by Delaware law.

4. The Commission was fully justified in refusing to engraft upon the Plan the extraneous conditions desired by the petitioner.

POINT I

There was no requirement under the Act, either express or implied, that the Plan be submitted to a District Court for enforcement.

The gist of the petitioner's argument is that the Circuit Court of Appeals erred in not holding that the Corporation's Plan should have been made subject by the Commission, to either a vote of the stockholders of the Corporation or an enforcement proceeding in a United States District Court. In this petition for review, he presses the point that, having approved the plan without provision for a vote of stockholders, the Commission was *required* by the Act to resort to an enforcement proceeding. The immediate answer to this argument is that the Act imposes no such requirement.

Section 11(b)(2) of the Act makes it the duty of the Commission to require, after notice and hearing, that a registered holding company take such steps as the Commission may prescribe to cure unnecessary complications in the system structure and any inequitable distribution of voting power among security holders, and to cease to be a holding company with respect to subsidiaries which themselves have holding companies as subsidiaries. As noted, The United Corporation's Plan was a step in compliance with an order of the Commission issued under Section 11(b)(2) requiring the Corporation to recapitalize to a single class of stock and to cease to be a holding company.

Sections 11(d) and 11(e) provide alternative methods for insuring compliance with an order issued under Section 11(b)(2).

Section 11(d), which may be invoked if a company may refuse to comply voluntarily with an order of the Commission entered under Section 11(b)(2), provides that "the Commission *may* apply" to a District Court for an enforcement order.

Section 11(e), under which The United Corporation's Plan was filed, permits a company to submit to the Commission a plan of its own choice to enable the company to effect compliance with Section 11(b)(2), and requires the Commission to issue an order approving the plan, if the Commission finds the plan necessary to effectuate the provisions of subsection (b)(2) and fair and equitable to persons affected thereby. Subsection (e) further provides that, after the Commission has approved such a plan, "the Commission at the request of the company *may* apply" to a District Court for an order enforcing and carrying out the plan.

As the Court of Appeals found, the wording of these provisions of the statute is "very clearly permissive", and does not create the mandatory direction upon which the petitioner's argument is based.

Because it appears from the face of the statute that the requirement urged by the petitioner does not exist, he has been compelled to argue, in effect, that the statute must contain, at least implicitly, a provision for District Court enforcement in order that the rights of possible dissenters may be protected. Such an argument, however, ignores the fact that such protection, as may be needed, is provided in another section of the Act. Section 24(a) gives to persons aggrieved by an order of the Commission the right of review by direct petition to the proper Circuit Court of Appeals, a right fully exercised by this petitioner in the instant case.

The mandatory requirement for enforcement proceedings, as argued by the petitioner, is rendered absurd when considered in the light of the present proceedings.

Certainly enforcement proceedings under Section 11(d) as to the Commission's basic Section 11(b)(2) order of August 14, 1943 were not required, since the Corporation had undertaken to comply with that order. Enforcement proceedings with respect to the Section 11(e) Plan for an

exchange of securities would likewise have been ridiculous, since the Plan was *voluntary*—and the District Court would have had nothing to enforce.

The decision of the Circuit Court of Appeals for the Third Circuit in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. (2d) 747 (1943) is not in conflict with the decision of the Circuit Court in the instant case

In an attempt to establish a conflict of authority as support of his petition, the petitioner contends that the decision of the Circuit Court of Appeals for the Third Circuit in the *Commonwealth & Southern* case is contrary to the decision of the Circuit Court in the present case. It seems to be the petitioner's view that in the *Commonwealth & Southern* case, the Court held that, where the action to be taken under a Section 11(e) plan would be subject, under State law, to approval by stockholders, the Commission's order under the act must provide for either such stockholder approval or enforcement proceedings in a District Court.

The Circuit Court, in affirming the Commission's orders in the present case, rejected the petitioner's interpretation of the decision in the *Commonwealth & Southern* case. Indeed, it found that decision to be wholly consistent with the procedure affirmed in the present case.

It is to be noted that the *Commonwealth & Southern* case involved no concrete plan for compliance with a Section 11(b)(2) order of the Commission. Rather, the Court had before it an attack upon the Commission's power to issue a so-called "blanket" recapitalization order under Section 11(b)(2) and a challenge of the validity of the Act as invoked by the Commission. The Court held that the Commission's order was explicitly authorized by Section 11(b)(2) and that the Section was constitutional.

To support its contention that Section 11(b)(2) did not warrant the recapitalization order, the Company in that case claimed that it did not have the power to effect a mandatory recapitalization of its Preferred and Common Stocks. The Court held, however, that the Act itself provided Commonwealth & Southern with the power to effect the required recapitalization, pointing out the various methods under the Act for carrying out a Section 11(b)(2) order of the Commission.

The first method noted by the Court—and clearly the preferable method—was precisely the method adopted by The United Corporation for effectuating its Plan in the present case. The Court stated (p. 751):

> "The first of these methods is through a plan voluntarily submitted by the company under subsection (e) of section 11 and approved by the Commission. *If the plan is one which can be carried out by the sole action of the parties thereto no further proceedings are needed.* * * *"

The United Corporation's Plan was voluntarily submitted under subsection (e) of Section 11. It contained no provision for "further proceedings" since such further proceedings were not needed to carry out the *voluntary* exchange transactions provided for in the Plan.

The excerpts from the opinion of the Circuit Court in the *Commonwealth & Southern* case which the petitioner has selected to use in his brief have no possible relevancy to any issue before the Court on this petition for a writ of certiorari. They deal with the Commission's power under Section 11(d) of the Act to seek enforcement, *against the opposition of a company*, of a plan for compliance with an order issued under Section 11(b)(2), and with the *right of a company* to request the Commission, pursuant to Section 11(e), to apply to a District Court for enforcement of a mandatory recapitalization plan.

Rather, as indicated above, and as the Circuit Court in the present case explicitly observed, the *Commonwealth & Southern* case affirmatively approves the procedure followed by The United Corporation in effecting its Plan.

The Petitioner's misapprehension of the requirements of the General Corporation Law of Delaware

Underlying the petitioner's argument is his misapprehension that the approval by the stockholders of The United Corporation of the Plan for an exchange of securities was required under provisions of the Delaware law

The Circuit Court of Appeals noted the force of the Corporation's view, that no such stockholder approval was required under the laws of the state of incorporation, but held that the point was immaterial, since the federal statute had an overriding effect.

It may be noted, however, that, as against the petitioner's attempt to characterize the exchange Plan as a "reorganization" and "dissolution" of the Corporation under Delaware law, it was, in effect, nothing more than a method for purchasing the Corporation's Preference Stock. Section 27 of the Delaware Law authorizes such a purchase by action of the Board of Directors alone.

POINT II

The Commission was justified in refusing to engraft upon the Plan the extraneous conditions desired by the petitioner.

As previously noted, the petitioner was at all times willing to accept the Corporation's Plan, despite his claims as to the Plan's invalidity, provided the Commission or the Court would engraft upon it certain conditions which would

require the Corporation to change existing quorum provisions for stockholders' meetings, to grant cumulative voting privileges, and to place on its Board of Directors someone who would "represent" the stockholders who gave proxies to the petitioner at the Corporation's annual meeting in 1944.

The petitioner's pretext for attempting to force upon the Corporation and the Commission his desire to participate in the management of the Corporation is that these conditions, if imposed, would cure a claimed "maldistribution" of voting power within the Corporation.

It is, however, obvious that the conditions sought by the petitioner are quite unrelated to a proposal to eliminate shares of Preference Stock through a voluntary exchange of securities, and would have no effect whatsoever upon the distribution of voting power between the Corporation's Common Stock and the remaining shares of Preference Stock.

In a different proceeding with respect to the Corporation, where the Commission approved, pursuant to Section 11(c), a one year extension of time for compliance with the order of August 14, 1943, the Commission refused this petitioner's request that these same conditions be then imposed and, in its opinion, made it unmistakably clear that the conditions were totally unrelated to the order of August 14, 1943. *In the Matter of The United Corporation,* S. E. C. File No. 59-25; Holding Company Act Release No. 5555.

The Commission's opinion stated, in part:

> "Most of the conditions requested by the objecting stockholders pertain to representation on the Board of Directors, through provisions for cumulative voting or otherwise, of preference and common stockholders who are opposing the present management. * * * Our order directing the company to change its capitalization to one class of stock was designed, among other things, to eliminate the in-

> equitable distribution of voting power between the holders of the common and preference stocks. The proposed conditions seeking representation for opposition stockholders would have no remedial effect on this disproportion of voting power between the two classes, and would thus not be a step in compliance with our order."

It must be concluded, therefore, as the Circuit Court of Appeals observed, that the petitioner's present attempt to impose these conditions is calculated only "to secure for petitioner that position in Company affairs for which he waged a proxy battle only to lose it at the Company's annual meeting" (R. Part IV, I).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted

William L. Ransom
Counsel for Respondent
The United Corporation

Dated: New York, N. Y.
May 3, 1946